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IN THE

Supreme Court of the United States

October Term, 1959.

No. ~~607~~ 35

WATERMAN STEAMSHIP CORPORATION,

Petitioner,

v.

DUGAN & McNAMARA, INC.,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT.

THOMAS F. MOUNT,
HARRISON G. KILDARE,
J. WELLES HENDERSON,
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IN THE
Supreme Court of the United States.

OCTOBER TERM, 1959.

No.

WATERMAN STEAMSHIP CORPORATION,
Petitioner,

v.

DUGAN & McNAMARA, INC.,
Respondent.

**PETITION FOR A WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS FOR THE
THIRD CIRCUIT.**

*To the Honorable, the Chief Justice and Associate Justices
of the Supreme Court of the United States:*

Petitioner, Waterman Steamship Corporation, respectfully prays that a Writ of Certiorari may issue to review the final judgment of the United States Court of Appeals for the Third Circuit, entered on November 17, 1959, affirm-

ing the judgment of the District Court of the United States for the Eastern District of Pennsylvania, in the appeal docketed in the said Court of Appeals as No. 12,537.

OPINIONS OF THE COURTS BELOW.

The judgment of the District Court for the Eastern District of Pennsylvania, consisting of remarks addressed to the Jury at the close of the trial by the Trial Judge in sustaining respondent's motion to dismiss, is unreported and is printed in Appellant's Appendix in the Court below at pages 263a to 268a. The opinion of the Court of Appeals filed on January 16, 1959, later withdrawn, is reported in 1959 American Maritime Cases at page 411, but not in the Federal Reporter, and appears at pages 1a to 3a in the Appendix. Chief Judge Biggs dissented (Appendix, pages 3a to 7a).

The final opinion of the Court of Appeals, filed on November 17, 1959, is unreported and appears at page 11a in the Appendix, with the dissenting opinions of Chief Judge Biggs and two other members of the court beginning at page 15a.

JURISDICTION.

Jurisdiction in the District Court was based upon diversity of citizenship between the original plaintiff, Jasper King, and the original defendant, Waterman Steamship Corporation, as owner of the vessel on which the accident occurred which resulted in the plaintiff's injuries while he was working as a longshoreman. The shipowner then joined Dugan & McNamara, Inc., the plaintiff's stevedore employer, as third-party defendant to assert its right to indemnity on the ground that the accident had been caused by substandard performance of the stevedoring services.

Waterman Steamship Corporation having settled the injury claim with the plaintiff, the trial was limited to issues involved in the third-party action. At the close of the testimony, the Trial Judge sustained the third-party defendant's motion to dismiss, treating it as a motion for judgment under Civil Rule 50 (Appellant's Appendix 266a).

On January 16, 1959, the Court of Appeals affirmed the judgment of the lower court. This judgment was subsequently set aside and rehearing was granted to consider the force and effect of this Court's decision in *Crumady v. The Joachim Hendrik Fisser v. Nacirema Operating Co., Inc.*, 358 U. S. 423, decided on February 24, 1959.

On November 17, 1959, after reargument before the court *en banc*, judgment was entered, again affirming the judgment of the District Court, three judges dissenting.

The jurisdiction of this Court is invoked under 28 U. S. C., Sec. 1254(1).

QUESTION PRESENTED.

May a shipowner, having paid damages to a longshoreman injured on its vessel, obtain indemnity for its loss against the stevedore whose breach of contract through substandard performance caused the injury to the longshoreman, there being no express contract between the shipowner and the stevedoring company for the unloading of the ship?

STATEMENT OF THE CASE.

The plaintiff longshoreman was injured in the hold of petitioner's vessel while employed by respondent to discharge a cargo of bagged sugar. The evidence showed that the longshoreman was struck by bags of sugar falling from the stow by reason of the fact that his employer and its representatives in charge of the work had adopted a procedure which was improper and dangerous.

The vessel had been chartered by petitioner as owner to the sugar refining company, which in turn had contracted through its Philadelphia subsidiary with the respondent stevedore to unload the cargo (Appellant's Appendix 214a, 215a, 265a). There was no express contractual arrangement between the shipowner and the stevedoring company.

Previous to the trial, petitioner had settled the plaintiff's injury claim for a sum which respondent agreed was fair and reasonable (Appellant's Appendix 57a, 66a, 67a, 264a).

After both parties had presented their testimony, the Trial Judge sustained respondent's motion to dismiss, treating it as a motion for judgment under Civil Rule 50 (Appellant's Appendix 268a), on the ground that there was no right of indemnity without an express contract having been entered into between the shipowner and the stevedore (Appellant's Appendix 266a).

The petitioner appealed, and the first argument thereon was heard by the Court of Appeals on June 10, 1958. By request of the court the appeal was re-argued before the court *en banc* on December 1, 1958. In a per curiam opinion, the court affirmed the court below solely on the ground that no indemnity could be allowed because "any obligation of a stevedoring company to indemnify a ship for ship-board injury of its employees in the course of their employment must be bottomed on agreement between the parties, express or implied."

Chief Judge Biggs, dissenting, stated that on the evidence the jury "would have been entitled to find, as contended by Waterman, that the 'direct, proximate, active and substantial cause of the accident' was the negligence of the stevedoring company," and that "indemnity for the shipowner need not necessarily be based on an express contract between the shipowner and the stevedoring company."

Thereafter, this Court reversed the Third Circuit in *Crumady v. The Joachim Hendrik Fisser v. Nacirema Operating Co., Inc.*, *supra*.

The Court of Appeals then set aside the judgment herein, withdrew the first opinion upon petitioner's motion for rehearing, and heard reargument before the court *en banc* to consider the effect of the *Crumady* decision upon the present appeal (Appendix 9a).

On November 17, 1959, the Court of Appeals decided, with the Chief Judge and two other members of the court dissenting, that the *Crumady* decision did not alter the requirement of contractual privity between the shipowner and the stevedore.

REASONS RELIED ON FOR ALLOWANCE OF THE WRIT.

I. The Decision Conflicts With the Applicable Decisions of This Court.

The decision of the Third Circuit in this case directly conflicts with the decision of this Court in the *Crumady* case, which held that the shipowner was entitled to indemnity against a stevedoring company without privity of contract.

In *Crumady*, as here, the services of the stevedoring company had been contracted for by someone other than the shipowner. This Court found that the shipowner was entitled to indemnity, stating as follows (358 U. S. at 428-429):

“A majority of the Court ruled in *Ryan Co. v. Pan-Atlantic Corp.*, 350 U. S. 124, that where a shipowner and stevedoring company entered into a service agreement, the former was entitled to indemnification for all damages it sustained as a result of the stevedoring company's breach of its warranty of workmanlike service. And see *Weyerhaeuser S. S. Co. v. Nacirema Co.*, 355 U. S. 563. * * *

“We think this case is governed by the principle announced in the *Ryan* case. *The warranty which a stevedore owes when he goes aboard a vessel to perform services is plainly for the benefit of the vessel whether the vessel's owners are parties to the contract or not.* That is enough to bring the vessel into the zone of modern law that recognizes rights in third-party beneficiaries. Restatement, Law of Contracts, Sec. 133. Moreover, as we said in the *Ryan* case, ‘competency and safety of stowage are inescapable elements of the service undertaken.’ 350 U. S., at 133. They

are part of the stevedore's 'warranty of workmanlike service that is comparable to a manufacturer's warranty of the soundness of its manufactured product.' *Id.*, at 133-134. See *MacPherson v. Buick Motor Co.*, 217 N. Y. 382, 111 N. E. 1050.

"We conclude that since the negligence of the stevedores, which brought the unseaworthiness of the vessel into play, amounted to a breach of the warranty of workmanlike service, the vessel may recover over." (Emphasis supplied.)

The Third Circuit attempts to restrict the holding of this Court in the *Crumady* case to contracts between the stevedore and the operator of the vessel. The court below stated (Appendix 14a):

"Thus, the actual holding of the *Crumady* case seems to be that a contractual undertaking of the stevedore with the operator of a ship, who is not the owner, to unload in a safe and workmanlike manner inures to the ship. In contrast the case now before us affords no basis for finding or assuming that the operator of the ship had any dealing whatever with the stevedoring company which discharged the cargo. To the contrary, as already pointed out, the District Court indicated and counsel have represented that the carriage was on such terms and conditions that the consignee was responsible for the discharge of its own goods and arranged with the stevedoring company for the performance of that job. The shipowner and the stevedoring company were strangers. It necessarily follows that the alleged duty upon which the present claim rests can only be an imposition on a wrongdoer *in invitum*. It is a question of tort liability, rather than one of contract or warranty, whether either wrongdoer must share the burden of a recovery by the injured party against the other wrongdoer. In reality we have here a problem of con-

tribution between tortfeasors and not one of indemnification for breach of warranty."

This misconception of the reasoning in the *Crumady* decision disregards the position of the shipowner as third-party beneficiary. Nothing in the language used by this Court suggests an intention to limit the third-party beneficiary principle to contracts by stevedoring companies with ship operators. The *Ryan* case stressed the obligation of the stevedore to perform the contract in a workmanlike manner, allowing indemnity to the shipowner for breach of the stevedore's warranty of workmanlike service. In *Crumady*, the Court applied the analogy of the manufacturer's warranty to the stevedore's obligation, without regard to privity of contract. The Third Circuit in declining to acknowledge that the privity doctrine has been rejected has misapplied the *Crumady* decision by attempting to limit its scope.

Nor may the two cases be distinguished on the ground that the action in *Crumady* was against the vessel in rem, since the shipowner, whether he is sued in personam or defends as claimant of the vessel in a suit in rem, sustains like damages in either case as the result of the stevedoring company's breach of warranty.

The Third Circuit erred in concluding that the shipowner and the stevedoring company in this case were "strangers" and that petitioner is, in effect, a joint tortfeasor barred from recovery of contribution. Rather than representing a "prohibited misuse of the concept of indemnity to obtain contribution" as found by the court below, this case is identical in principle with the *Crumady* case.

The concept of a shipowner as "stranger" to the stevedore who discharges the cargo from his vessel, requiring the stevedore to make use of the ship's equipment and generally perform one of the traditional duties of the crew, cannot be accepted. Although the stevedore may not con-

tract directly with the shipowner, he does not come aboard the vessel as a trespasser. Someone having a direct interest in the business of the vessel has contracted for the stevedoring services, and whether the contract was made by the shipowner, the ship's operator, or the consignee of the cargo, the work of the stevedore is ultimately for the benefit of both the shipowner and himself. He comes aboard with the same authority to carry out the work as though the shipowner had directly contracted for the work and requested him to perform the services in a safe, proper and workmanlike manner.

The present decision accordingly conflicts with the decision of this Court in the *Crumady* case, and should be reversed.

II. The Decision Has Decided an Important Question of Federal Law Which Should Be Decided by This Court.

The shipowner's absolute and non-delegable duty to furnish a seaworthy vessel and equipment imposes a unique and burdensome form of liability without fault. The shipowner, or the vessel in rem, are liable not only for furnishing unseaworthy gear to workmen, but may become liable for injuries to shore workmen caused by defective equipment brought aboard by their own employer, *Alaska Steamship Co. v. Petterson*, 347 U. S. 396 (1954), and for misuse of seaworthy equipment by longshoremen, *Grillea v. United States*, 232 F. 2d 919 (C. A. 2, 1956). As the orbit of liability increases, there is a corresponding increase of instances where the absolute liability of the vessel or shipowner for injuries caused by unseaworthiness is due entirely to the fault or acts of others.

The position of the shipowner is exceptional from the standpoint of his lack of actual control over the circumstances which create his liability. Merchant vessels are commonly placed by charter under the control of others than the shipowner, and charterers often transfer control

and management of their ships to one or more sub-charterers. Foreign owners may have no direct contact with the physical operation of their ships in American ports for months at a time.

Such special relationship of the shipowner to his vessel often places him at an extreme disadvantage in dealing with claims of injury to shore workers arising from unseaworthiness, particularly when such claims are due to the sub-standard performance of shore contractors whom the shipowner did not employ, and with whom he had no contractual privity. To deny indemnity in these situations is unjust and unreasonable. The shipowner is fairly entitled to indemnity by virtue of his peculiar position under his warranty of seaworthiness which imposes liability without fault.

If the decision of the court below is to stand, two identical ships at adjacent piers, employing the services of the same stevedore for loading or discharging the same type of cargo, sued by longshoremen for injuries resulting from identical conduct constituting breach of the stevedore's warranty of workmanlike service, would be allowed or denied indemnity solely upon the question of privity of contract. If the shipowner or operator of one ship had engaged the services of the stevedore, indemnity would be allowed. If the consignee of the cargo on the other ship had engaged the services, indemnity would be denied. This result is neither just nor realistic, and the decision in the *Crumady* case does not support it.

Until this Court reversed the Third Circuit in the *Crumady* case, it was the unquestioned law in this circuit that shipowners could not obtain indemnity from shore contractors under any circumstances of loss without direct contractual privity with the party at fault. The language of the *Crumady* decision seems clearly intended to extend indemnity rights to shipowners without privity of contract, on the ground that they were within the "zone of law that recognizes rights in third-party beneficiaries." 358 U. S.

at 584. The present decision, reached during the same year, creates confusion and doubt regarding the intended scope of the principle of the *Crumady* case.

The question here presented is a matter of extreme importance in the active field of maritime litigation, and should be settled by this Court.

CONCLUSION.

A writ of certiorari should be granted in accordance with the prayer of this petition.

Respectfully submitted,

THOMAS F. MOUNT,
HARRISON G. KILDARE,
J. WELLES HENDERSON,
Counsel for Petitioner.

Dated: Philadelphia, Pennsylvania
February 4, 1960

APPENDIX.

**UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT**

No. 12,537

JASPER KING

v.

**WATERMAN STEAMSHIP CORPORATION,
DEFENDANT AND THIRD-PARTY PLAINTIFF,**
Appellant

v.

DUGAN & McNAMARA, INC., THIRD-PARTY DEFENDANT,
Appellee.

**APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE
EASTERN DISTRICT OF PENNSYLVANIA**

Argued June 10, 1958

Reargued December 1, 1958

**Before: BIGGS, Chief Judge; MARIS, GOODRICH, McLAUGHLIN,
KALODNER, STALEY and HASTIE, Circuit Judges.**

OPINION OF THE COURT

(Filed January 16, 1959)

PER CURIAM:

This is an appeal by a third-party plaintiff, defendant to the original negligence claim, from a decision that as a matter of law it is not entitled to be indemnified by the appellee, against which it has made the present third-party claim.

It is admitted that appellant, a shipowner, has paid damages to the original plaintiff, a stevedore, for shipboard injuries caused in part by the improper stowage of cargo. Appellant concedes its absolute liability to the injured stevedore for the harmful consequences of this unseaworthy condition. However, appellant claims indemnity from the appellee, the stevedoring company which employed the injured man, on the theory that primary responsibility for the accident and an obligation to indemnify the shipowner should be imposed on the appellee because the immediate cause of the accident was appellee's negligence in unloading the cargo, improper though the stowage admittedly was.

How this case might have stood had the shipowner employed the stevedoring company to unload the cargo in question we need not and do not decide. For appellant neither alleged in its third-party complaint nor sought to prove any contractual relation between shipowner and stevedoring company. Rather, as an affirmative defense, appellee in its answer asserted that there was no contract between these parties. The correctness of this allegation was stipulated at trial. Thus, whatever arrangement was made for unloading the cargo,¹ the shipowner was not party to it and claims no benefit under it.

The District Court ruled that in such a situation as this the absence of a contractual relation between the parties is fatal to the indemnity claim. Any obligation of a stevedoring company to indemnify a ship for shipboard injury of its employees in the course of their employment must be bottomed on agreement between the parties, express or im-

1. It was stated to us in argument and mentioned by the court below in directing a verdict against the third-party claim that the stevedoring company had been employed by the owner of the cargo to unload it. But no evidence was introduced concerning this matter and counsel for the appellant stated to the court below that the particular contractual arrangement under which the unloading was performed was not material to the third-party claim.

plied in fact. We have so stated in *Brown v. American-Hawaiian S. S. Co.*, 3d Cir. 1954, 211 F.2d 16, 18 and *Crawford v. Pope & Talbot, Inc.*, 3d Cir. 1953, 206 F.2d 784, 793. We adhere to that view of the matter.

The judgment will be affirmed.

Biggs, Chief Judge, dissenting.

Deeming the evidence to be insufficient to support a finding that the ship's cargo-loading gear which broke injuring the longshoreman was unseaworthy, this court in *Crumady v. The Joachim Hendrik Fisser*, 249 F.2d 818, 821 (1957), cert. granted 357 U.S. 903 (1958), stated that for that reason, "[W]e do not reach the substantial question raised by the impleaded respondent [the stevedoring company] whether there would have been legal basis for making it an indemnitor, had the ship's liability been sustained." In *Crumady* there was no express contract, written or oral, between the shipowner and the stevedoring company for the unloading of the vessel. 142 F.Supp. 389 (D.N.J. 1956); at p. 401. In the instant case there was no express contract, written or oral, for the unloading of the ship between the shipowner, Waterman, and the stevedoring company, Dugan and McNamara, Inc., the latter company having unloaded the vessel perhaps because of an "understanding" with the shipowner, Waterman.¹ "The

1. Apparently there was no express contract, oral or written, for the unloading of the vessel. It should be noted, however, that paragraph 5 of the injured longshoreman's complaint alleges that Dugan and McNamara, Inc. was employed to discharge the cargo "by virtue of authority from and an understanding entered into" by Dugan and McNamara, Inc. with the vessel's "owner", alleged to be Waterman. Waterman's answer to the longshoreman's complaint, paragraphs 2 and 3, admitted the allegations of paragraph 5 of the complaint with an immaterial qualification. The amended third-party complaint is silent as to any contract or "understanding" for the unloading of the vessel. The second defense of the amended answer to the third-party

substantial question" referred to by this court in *Crumady* is before us in the instant case. It is whether the shipowner may recoup its loss against the stevedoring company if that company's negligence caused the injury to the longshoreman, there being no express contract for the unloading of the ship entered into by the shipowner and the stevedoring company.

In so stating I am not unmindful of the ruling of this court in *Hagans v. Farrell Lines*, 237 F.2d 477 (1956), that neither indemnity nor contribution can be recovered by the shipowner from the stevedoring company where the shipowner's negligence has concurred with that of the stevedoring company in causing the accident. As was stated in the dissenting opinion in *Hagans*, 237 F.2d at p. 483, the decision of this court in that case unduly limited the scope of *Ryan Stevedoring Co. v. Pan-Atlantic S.S. Corp.*, 350 U.S. 124 (1956), and was in apparent conflict

complaint denies that "there is any contract upon which indemnity may be founded".

A stipulation entered into by counsel for Dugan and McNamara, Inc. and counsel for Waterman, transcript p. 296 in the form of question and answer given at sidebar during the trial was as follows: Counsel for Dugan and McNamara, Inc. stated to counsel for Waterman, "I think you will concede there was no agreement, written or oral, between the ship and Dugan and McNamara." Counsel for Waterman replied, "There was no contract between Dugan and McNamara and the Waterman Steamship Corporation, that is correct." Counsel for Dugan and McNamara, Inc. then said, "Oral or written." Counsel for Waterman replied, "I agree to that. That is right. We concede that, though we of course deny its materiality under the cases."

The nature of the arrangement for the unloading of the vessel is far from plain on this record but the pleading and the statements of counsel may express the view that even though there was no contract, oral or written, there was nonetheless an "understanding" between Waterman and Dugan and McNamara, Inc. that Dugan and McNamara, Inc. would unload the vessel but that such an understanding could not support indemnity. For the reasons set out at a later point in this opinion I think it is immaterial that there was no express contract, written or oral.

with American President Lines v. Marine Terminal Corp., 234 F.2d 753 (9 Cir. 1956), cert. den. 352 U.S. 926 (1956).²

I think, however, that the Hagans doctrine, even assuming its soundness, is inapplicable under the pleadings and the evidence in the case at bar for the jury would have been entitled to find, as contended by Waterman, that the "direct, proximate, active and substantial cause of the accident" was the negligence of the stevedoring company. I cannot conclude that the decision of the Supreme Court in Halcyon Lines v. Haenn Ship Corp., 342 U.S. 282 (1952), would prevent recovery by the shipowner if the stevedoring company's negligence was the direct, active, proximate and substantial cause of the longshoreman's injury. If the jury should so find, no principle of contribution necessarily would be involved for the law would then require no division of damages between the shipowner and the stevedoring company. Indemnity arises from a contract, express or implied, and enforces a duty on the wrongdoer to respond for damages. Thomas v. Malco Refineries, Inc., 214 F.2d 884, 885 (10 Cir. 1954). See Brown v. American-Hawaiian S.S. Co., 211 F.2d 16, 18 (3 Cir. 1954). Cf. the circumstances and the decision in Crawford v. Pope & Talbot, Inc., 206 F.2d 784, 793 (3 Cir. 1953). I had thought that the independent right to indemnity was established in this circuit by the decision in the case last cited. We point out also that in Weyerhaeuser S.S. Co. v. Nacirema Co., 355 U.S. 563, 569 (1958), the Supreme Court stated: "[W]e believe sound judicial administration requires us to point out that in the area of contractual indemnity an

2. It should be noted that the case at bar was heard before the court en banc as was the Hagans case and for this reason the present writer believes that a dissent should be recorded not only in the instant case but also to the fundamental principle involved in the majority opinion in Hagans and open for reconsideration here since a court en banc sat to adjudicate the instant case. As to possible rejection of this court's view in Hagans by the Supreme Court, see the illuminating opinion of Judge Hoffman in Ravel v. American Export Lines, 162 F. Supp. 279, 288 (E.D. Va. 1958).

application of the theories of 'active' or 'passive' as well as 'primary' or 'secondary' negligence is inappropriate.", citing *Ryan Stevedoring Co. v. Pan-Atlantic S.S. Co.*, *supra*.

Last, indemnity for the shipowner need not necessarily be based on an express contract between the shipowner and the stevedoring company. When a stevedoring company goes on a ship to unload it the stevedoring company represents in substance to the shipowner that the unloading will be done with reasonable care and in a reasonably safe manner under the circumstances. The stevedoring company may be deemed to offer a unilateral contract to the shipowner saying in substance: "If you will permit me to come upon your ship and unload it I will use reasonable care in the unloading." The shipowner accepts the offer by making its ship available. Such an arrangement or contract was in effect between the shipowner and the stevedoring company in *Hagans*, creating what was described there as a "relational duty", 237 F.2d at p. 481. As was stated in the majority opinion in *Brown v. American-Hawaiian S.S. Co.*, *supra*, 211 F.2d 16, n.4 cited to the text at p. 18: "It is difficult to conceive of a situation where there is no contract, either express or implied, between an employer whose men are aboard or about a vessel and the owner or charterer of such vessel." I think it is impossible. Cf. *Ryan Stevedoring Co. v. Pan-Atlantic S.S. Corp.*, *supra*, 350 U.S. at pp. 132-135.

Although the record does not reveal how Dugan and McNamara, Inc. came on board the vessel, some person must have engaged that company for stevedoring. Even if we were to assume that the consignee, or consignor, or some disinterested stranger, had hired Dugan and McNamara, Inc. to unload the cargo, a relationship, contractual in nature, would have arisen whereby Dugan and McNamara, Inc. would have been obligated to indemnify Waterman for damages which Waterman had sustained by reason of Dugan and McNamara, Inc.'s failure to unload the vessel as its duty requires. Under the assumed

circumstances Waterman could be deemed to be a third-party beneficiary of the contract made by the consignee or the consignor with Dugan and McNamara, Inc. for the unloading.

Or if it be the fact, as it asserted, that there was no express contract, written or oral, Dugan and McNamara, Inc.'s obligation to indemnify Waterman could be held to be one of *implied assumpsit*.³ Certainly it should not be assumed that Dugan and McNamara, Inc. came upon the vessel by accident and accidentally unloaded it and there is evidence tending to prove that the longshoreman was injured because Dugan and McNamara, Inc. failed in its duty.

Clearly there were issues here involved as to the respective liabilities of the parties, Waterman and Dugan and McNamara, Inc., which should have gone to the jury with proper instructions. See again *Weyerheuser S.S. Co. v. Nicirema Co.*, *supra*, 355 U.S. at p. 568.

For the reasons stated I respectfully dissent.

3. At common law *assumpsit* was implied where an undertaking was presumed to have been made by a party from his conduct although he had made no express promise. If there was a breach of contract in the performance the performer was held liable, *ex contractu*. *Moses v. Macferlan*, 97 Eng. Rep. 678 (1760). See also *Corpus Juris Secundum* Vol. 42, *Indemnity*, Section 21, pp. 596-597 and the dissenting opinion of Judge Goodrich in *P. Dougherty Co. v. United States*, 207 F.2d 626, 651 (1953), citing Dean Ames, writing in 2 Harv. L. Rev. 1 on "The History of Assumpsit", set out on page 2. See also *Revel v. American Export Lines*, referred to in note 2, *supra*, 162 F. Supp. at pp. 286-287.

Order (3/10/59)

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

No. 12,537

JASPER KING

v.

WATERMAN STEAMSHIP CORPORATION,
Appellant,

v.

DUGAN & McNAMARA, INC.

Present: BIGGS, *Chief Judge*, and GOODRICH, McLAUGHLIN,
KALODNER, STALEY and HASTIE, *Circuit Judges.*

ORDER.

Upon consideration of the motion filed by appellant on February 27, 1959 in the above-entitled case,

It is ORDERED that leave be, and it hereby is granted appellant to file a petition for rehearing out of time on or before March 26, 1956;

It is further ORDERED that the issuance of the mandate of this Court be stayed until further order of this Court.

By THE COURT,

WILLIAM H. HASTIE
Circuit Judge

March 10, 1959

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

—
No. 12,537
—

JASPER KING

v.

WATERMAN STEAMSHIP CORPORATION,
(DEPT. AND 3D-PARTY PLTF.),
Appellant,

v.

DUGAN & MCNAMARA, INC.
(3D-PARTY DEPT.)

—
Present: BIGGS, *Chief Judge*; and MARIS, GOODRICH, Mc-
LAUGHLIN, KALODNER, STALEY and HASTIE, *Circuit*
Judges.

—
ORDER.

Upon consideration of the petition for rehearing and of the answer thereto, in the above entitled case,

It is ORDERED that the judgment of this Court entered January 16, 1959 be and it is hereby vacated and that the Per Curiam and dissenting opinion filed January 16, 1959 be and they are hereby withdrawn;

It is Further ORDERED that the parties may file supplemental briefs as to the effect of the decision by the Supreme Court of the United States in *Crumady, Petitioner v. "Joachim Hendrik Fisser", etc. Petitioner v. Nacirema Operating Co., Inc.*, No. 62, October Term 1958, on the issues in the above entitled case;

10a

Order (4/7/59)

It is Further ORDERED that decision is reserved as to whether and when oral argument is to be had.

By THE COURT:

WILLIAM H. HASTIE

Circuit Judge

Dated:

April 7, 1959

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

No. 12,537

JASPER KING

v.

WATERMAN STEAMSHIP CORPORATION,
Defendant and Third-Party Plaintiff,
Appellant

v.

DUGAN & McNAMARA, INC.,
Third-Party Defendant,
Appellee.

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE
EASTERN DISTRICT OF PENNSYLVANIA

Argued June 10, 1958

Reargued December 1, 1958

Reargued October 5, 1959

Before: BIGGS, *Chief Judge*; GOODRICH, McLAUGHLIN,
KALODNER, STALEY, HASTIE and FORMAN, *Circuit Judges.*

OPINION OF THE COURT
(Filed November 17, 1959)

By HASTIE, *Circuit Judge.*

This is an appeal by a third-party plaintiff from a decision that as a matter of law it is not entitled to be in-

demnified by the appellee, against which it has made the present third-party claim. The appeal, originally argued before a division of this court, has been reargued twice before the court en banc. We ordered the second reargument so that the parties might fully present their views concerning the force and effect of the decision of the Supreme Court in *Crumady v. The Joachim Hendrik Fisser*, 358 U.S. 423, decided February 24, 1959, after the first reargument. This second reargument has also permitted Judge Forman, who has joined us since the first reargument, to participate in the decision of a doubtful question of importance which has divided us.

In the court below appellant shipowner, Waterman Steamship Co., was both defendant to the original maritime tort claim of a stevedore for shipboard injury and third-party plaintiff claiming indemnity from appellee, Dugan & McNamara, Inc., the stevedore's employer. The shipowner now appeals from a decision that it is not entitled to indemnity from the stevedoring company for an amount it has paid in satisfaction of the stevedore's principal claim. In the present posture of the litigation it must be and is admitted that the stevedore's injuries were caused in part by improper stowage of cargo. Appellant concedes its absolute liability to the injured stevedore for the hurtful consequences of this unseaworthy condition. However, appellant claims indemnity from the stevedoring company on the theory that primary responsibility for the accident and an obligation to indemnify the shipowner should be imposed on the appellee because the immediate cause of the accident was appellee's negligence in unloading the cargo, improper though the stowage admittedly was.

How this case might have stood had the stevedoring company been employed by the owner or operator of the ship to unload the cargo in question we need not and do not decide. For appellant neither alleged in its third-party complaint nor sought to prove any contractual relation or undertaking as the basis of the alleged liability. Rather,

as an affirmative defense, appellee in its answer asserted that there was no contract between these parties. The correctness of this allegation was stipulated at trial. Whatever arrangement was made for unloading the cargo,¹ the shipowner was not party to it and on the present record claims no standing under it.

The District Court ruled that in such a situation as this the absence of a contractual relation between the parties is fatal to the indemnity claim. We have said as much in *Brown v. American-Hawaiian S.S. Co.*, 3d Cir., 1954, 211 F.2d 16, 18 and *Crawford v. Pope & Talbot, Inc.*, 3d Cir., 1953, 206 F.2d 784, 792. Any obligation of a stevedoring company to indemnify a shipowner for shipboard injury of its employees in the course of their employment must be bottomed on a promise, express or implied in fact, of the stevedoring company. Otherwise, tort liability would be imposed upon the stevedoring company for negligent injury of its employee, a result prohibited by the Longshoremen's and Harbor Workers' Act. However, it is strongly urged that the Supreme Court in *Crumady v. The Joachim Hendrik Fisser*, 358 U.S. 423, has rejected the reasoning and impaired the authority of the *Brown* and *Crawford* cases. That contention is our principal concern here.

In the *Crumady* case the Supreme Court reviewed a decision of this court. We had not adjudicated the question of indemnity because it had been our view that there was no liability on the principal claim. However, the Supreme Court reversed us on the principal claim and then considered and sustained the indemnity claim. Thus, in considering what the Supreme Court said and did in the *Crumady* case we deal with an entirely familiar record.

1. It was stated to us in argument and mentioned by the court below in directing a verdict against the third-party claim that the stevedoring company had been employed by the owner of the cargo to unload it. But no evidence was introduced concerning this matter and counsel for the appellant stated to the court below that the particular contractual arrangement under which the unloading was performed was not material to the third-party claim.

Crumady was a libel in rem against a vessel by a stevedore who had been injured in unloading cargo. The ship impleaded the stevedoring company which had undertaken the unloading operation and had employed the principal plaintiff. The evidence showed that the shipowner had chartered the vessel to an operator who had contracted with the stevedoring company to unload the vessel. In these circumstances the Supreme Court ruled that "[t]he warranty [of workmanlike service] which a stevedore owes when he goes aboard a vessel to perform services is plainly for the benefit of the vessel whether the vessel's owners are parties to the contract or not." 358 U.S. at 428. The court added that the circumstances under consideration suffice "to bring the vessel into the zone of modern law that recognizes rights in third-party beneficiaries". *Ibid.* Thus, the actual holding of the *Crumady* case seems to be that a contractual undertaking of the stevedore with the operator of a ship, who is not the owner, to unload in a safe and workmanlike manner inures to the ship. In contrast the case now before us affords no basis for finding or assuming that the operator of the ship had any dealing whatever with the stevedoring company which discharged the cargo. To the contrary, as already pointed out, the District Court indicated and counsel have represented that the carriage was on such terms and conditions that the consignee was responsible for the discharge of its own goods and arranged with the stevedoring company for the performance of that job. The shipowner and the stevedoring company were strangers. It necessarily follows that the alleged duty upon which the present claim rests can only be an imposition on a wrongdoer *in invitum*. It is a question of tort liability, rather than one of contract or warranty, whether either wrongdoer must share the burden of a recovery by the injured party against the other wrongdoer. In reality we have here a problem of contribution between tortfeasors and not one of indemnification for breach of warranty. And the Supreme Court has clearly ruled that in these stevedore

injury cases the shipowner may not require contribution from the stevedoring company. *Halcyon Lines v. Haenn Ship Ceiling and Refitting Corp.*, 1952, 342 U.S. 282.

We find no indication that the Supreme Court in the *Crumady* case intended to abrogate or disregard the distinction between a permitted recovery-over based on contract and a prohibited misuse of the concept of indemnity to obtain contribution from a tortfeasor who enjoys the protection of the Longshoremen's and Harbor Workers' Act. We cannot square a recovery in this case with adherence to that distinction.

The judgment will be affirmed.

Biggs, *Chief Judge*, dissenting.

The record shows that the accident to King, the longshoreman whose claim against Waterman Steamship Corporation, the third-party plaintiff-appellant, was reasonably compromised by it, was caused by two factors. The accident occurred, first, because of the improper stowage of the cargo, bags of sugar, and second, because of the negligence of Dugan & McNamara Company, Inc., the third-party, defendant, in unloading the cargo. It was stipulated that there was "no agreement, written or oral, between the ship and Dugan & McNamara". The decision of this court is based upon the absence of contractual privity between Waterman and Dugan & McNamara though it appears to be conceded that if there were a contractual relation between them indemnity might be had by Waterman. See *Ryan Stevedoring Co., Inc. v. Pan Atlantic Steamship Corp.*, 350 U.S. 124 (1956), and *Weyerhaeuser Steamship Co. v. Nacirema Operating Co., Inc.*, 355 U.S. 563 (1958).

In the decision of the Supreme Court in *Crumady v. The J. H. Fisser*, 358 U.S. 423, 428-429 (1959), Mr. Justice Douglas stated: "We think this case is governed by the principle announced in the *Ryan* case. The warranty which a stevedore owes when he goes aboard a vessel to perform

services is plainly for the benefit of the vessel whether the vessel's owners are parties to the contract or not. That is enough to bring the vessel into the zone of modern law that recognizes rights in third-party beneficiaries. Restatement, Law of Contracts, § 133. Moreover, as we said in the *Ryan* case [cited *supra*], 'competency and safety of stowage are inescapable elements of the service undertaken.' 350 U.S. at 133. They are part of the stevedore's 'warranty of workmanlike service that is comparable to a manufacturer's warranty of the soundness of its manufactured product.' *Id.*, at 133-134. See *MacPherson v. Buick Motor Co.*, 217 N.Y. 382, 111 N.E. 1050.

"We conclude that since the negligence of the stevedores, which brought the unseaworthiness of the vessel into play, amounted to a breach of the warranty of workmanlike service, the vessel may recover over."

I can perceive no merit to the distinction attempted to be made by the majority that the proceeding in *Crumady* was *in rem* against the vessel and that the evidence showed that the shipowner had chartered the vessel to an operator who had contracted with the stevedoring company to unload it. *Crumady* shows that Waterman by way of the third-party beneficiary contract, was entitled to the warranty of workmanlike service that Dugan & McNamara, Inc. gave when it undertook to unload the vessel.

The judgment of the court below should be reversed.

Judge Goodrich and Judge McLaughlin join in this dissent.

GOODRICH, *Circuit Judge*, Concurring in dissent.

I agree with what Chief Judge Biggs has said in his dissent. I only want to add one idea. It seems to me that with the elimination of the necessity of contract between shipowner and stevedore, as I think the *Crumady* case decides, we may have developing here a situation in which

rights of shipowner against stevedore may be analyzed as growing out of a relationship between them not dependent upon contract. The stevedore comes on the ship to perform labor and he comes with the permission of the shipowner. It seems to me out of this permission and the relation established thereby there can well be a duty owed to the shipowner not to create, by the acts of the stevedore, a situation which will cause loss to the shipowner. An analogy is to be found in the duty of a person responsible for the conduct of another to be indemnified by the other for expense made in discharge of such a responsibility. See RESTATEMENT, RESTITUTION, §§ 96-99.